IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Arb.Case No.40 of 2006

Date of Decision: 1.3.2007.

Chiranji Lal Gupta

....Petitioner.

through Mr. D.K.Singal, Advocate.

Versus

Union of India and others.

through Mr. Kamal Sehgal, Advocate.

...Respondents.

CORAM : Hon'ble Mr.Justice Vijender Jain, Chief Justice.

1.Whether Reporters of Local Newspapers may be allowed to see the judgment?
2.To be referred to the Reporters or not?
3.Whether the judgment should be reported in the Digest?

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VIJENDER JAIN ,C.J.(ORAL)

This petition under Section 11 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the `Act') for appointment of an arbitrator to adjudicate the disputes between the parties arising out of the agreement has been filed by the petitioner.

Learned counsel for the respondents has contended that this petition under Section 11(6) of the Act will not be maintainable. According to learned counsel for the respondents the final bill was accepted by the petitioner without any protest and that was done on 11.4.2000. It is

contended that when full and final settlement has been arrived at between the parties without raising any protest, the present petition cannot be maintained. Referring to Clause 25 of the Arbitration Agreement, it is contended by learned counsel for the respondents that the petition will not be maintainable under Section 11(6) of the Act as clause 25 of the Agreement provides a mechanism for settling the disputes and in the event of the petitioner not taking recourse to such mechanism, the petition under Section 11(6) of the Arbitration Agreement Act would not be maintainable. Learned counsel for the respondents has further contended that the petition is barred by limitation. In support of his contention learned counsel for the respondents has relied upon M/s P.K.Ramaiah and Company Versus Chairman & Managing Director 1994 Supp. (3) Supreme Court Cases 126,and Union of India Vs. M/s Popular Builders 2001 (1)RCR (Civil) 363. Learned counsel for the respondents has also relied upon Major (Retd.) Inder Singh Rekhi V.Delhi Development Authority AIR 1988 Supreme Court 1007 and S.Rajan V.State of Kerala and another AIR 1992 Supreme Court 1918.

On the other hand learned counsel for the petitioner has contended that the petition under Section 11(6) of the Act is maintainable as the petitioner had written at the first instance to the Executive Engineer on 6.5.2000, inter alia stating that lot of measurements and payment are still pending and the measurements and bill are not acceptable to him. My attention has also been drawn to the letter written by the petitioner to the Executive Engineer on 11.8.2000 with a copy to the Chief Engineer requesting to settle the claim listed at Annexure-A. On the copy to the Chief Engineer, there was a request by the petitioner to the said Chief

Engineer to treat the said letter as request for arbitration under clause 25 of the agreement. On the basis of the aforesaid letter, it is contended before me that limitation as a matter of fact, would start from 11.8.2000 and therefore, the petition filed by the petitioner was in time as the same was presented to the court on 8.7.2003. Another argument raised by the learned counsel for the petitioner is that the last payment was made by the respondent on 24.8.2002 on the basis of Annexure-A16 (Page 119). The payment of a sum of Rs.74266/- was made by the respondent towards final bill on 24.8.2002 and if the payment was made on 24.8.2002 the petition was well within time.

I have given my careful consideration to the arguments advanced by learned counsel for the parties. Clause 25 of the Agreement which reads as under:-

> "Clause-25-Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:-
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> (i)If the contractor considers any work demanded of him to be

outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter. If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, given notice to the Chief Engineer for appointment of Arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii)Except where the decision has become final, binding and conclusive in terms of sub para (1) above disputes or

difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, incharge of the work or if there be no Chief Engineer, the administrative head of the said CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessors.

It is a term of this contract that the party invoking arbitration shall give a list of disputes within amounts claimed in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Chief Engineer CPWD or the administrative head of the CPWD, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred

and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940, or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause.

The arbitrator may from time to time within the consent of the parties enlarge the time for making and publishing the award.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the

parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

The Supreme Court in Chariman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors 2004 (1) Arb.LR 156 (SC) after considering the relevant cases cited, namely:

1.Damodar Valley vs. K.K.Kar. (1974)1 SCC 141,

2.M/s Bharat Heavy Electricals. Ltd vs. M/s Amar Nath Bhan Prakash, (1982) 1 SCC 625,

3.Union of India and another vs.L.K.Ahuja and co. (1988)3 SCC 76,

4.M/s P.K. Ramaiah and Company Vs.Chairman & Managing Director, National Thermal Power Corpn., 1994 Suppl. (3) SCC 126 and

5.Nathani Steels Ltd. Vs. Associated Constructions, 1995 Suppl. (2) SCC 324 ,

held as under:

"Even when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the Arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the

amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts."

In the operative paragraph of the judgment in N.T.P.S's case (supra) the Apex Court held as follows:

"38.The fact situation in the present case, would lead to the conclusion that the Arbitration Agreement subsists because:

(i) Disputes as regard final bill arose prior to its acceptance thereof in view of the fact that the same was prepared by the respondent but was not agreed upon in its entirety by the appellant herein.

(ii) The appellant has not pleaded that upon submission of the final bill by the respondent herein any negotiation or settlement took place as a result whereof the final bill, as prepared by the appellant, was accepted by the respondent unequivocally and without any reservation therefor.

(iii) The respondent herein immediately after receiving the payment of the final bill, lodged its protest and reiterated its claim.

(iv) Interpretation and/or application of Clause 52 of the agreement would constitute a dispute which would fall for consideration of the Arbitrator.

(v)The effect of the correspondences between the parties would have to be determined by the Arbitrator, particularly as regard the claim, of the respondent that the final bill was accepted by it without prejudice.

(vi)The appellant never made out a case that any novation of the contract agreement took place or the contract agreement was substituted by a new agreement. Only in the event, a case of creation of new agreement is made out the question of challenging the same by the respondent would have arisen.

(vii)The conduct of the appellant would show that on receipt of the notice of the respondent through its advocate dated 21.12.1991 the same was not rejected outright but existence of disputes was accepted and the matter was sought to be referred to the Arbitration.

(viii)Only when the classificatory letter was issued the plea of settlement of final bill was raised.

(ix)The finding of the High Court that a prima facie in the sense that there are triable issues before the Arbitrator so as to invoke the provisions of Section 20 of the Arbitration Act, 1940 cannot be said to be perverse or unreasonable so as to warrant interference in exercise of extraordinary jurisdiction under Article 136 of the Constitution of India.

(x)The jurisdiction of the Arbitrator under the 1940 Act although emanates from the reference, it is trite, that in a given situation the Arbitrator can determine all questions of law and fact including the construction of the contract agreement.(See Pure

Helium India Pvt. Ltd. vs. Oil and Natural Gas Commission reported in 2003(8) SCALE 553=2003(3) Arb.LR 409(SC).

(xi)The cases cited by the learned counsel for the appellant P.K.Ramaiah and Company (supra) and Nathani Steels (Supra), would show that the decisions therein were rendered having regard to the finding of fact that the contract agreement containing the Arbitration clause was substituted by another agreement. Such a question has to be considered and determined in each individual case having regard to the fact situation obtaining therein."

Similarly in a recent judgment the Supreme Court in M/s Ambica Construction Vs. Union of India 2007(1) RCR (Civil) 257 held as follows:

"In such circumstances we are inclined to hold that notwithstanding Clause 43(2) of the General Conditions of Contract and the submission of a No Claim Certificate by the appellant, the appellant was entitled to claim a reference under the contract and the Division Bench of the Calcutta High Court was wrong in holding otherwise."

From all the decisions noted above and in view of the fact that the petitioner has raised a dispute with regard to the non payment of the bills on the basis of alleged incorrect measurements, vide its first letter dated 6.5.2000. The letter may not have been happily worded but it reflects that the petitioner has disputed the measurements as well as payment of bills. Thereafter again the petitioner vide his letter dated 11.8.2000, copy of which was addressed to the Executive Engineer of the respondents, copy

of which was sent to the Chief Engineer, again reiterated his plea and specifically asked the respondents to refer the matter for arbitration. Another fact which is relevant and demolishes the plea of the respondents with regard to their plea of limitation is the factum of payment made of a sum of Rs.74266/- by the respondents on 24.8.2002. Therefore, judging from any angle there is no force in the argument of the respondents merely because the petitioner has signed on a bill regarding measurements cannot be a ground to oust the arbitration clause as the disputes and differences still remained as per the arbitration agreement between the parties.

As the respondent has failed to supply the vacancy as per arbitration clause it has lost the right to supply the vacancy. Therefore I appoint, Justice A.L.Bahri, retired Judge of this Court as an Arbitrator to decide the dispute between the parties. The arbitrator shall fix his own fees. The parties are directed to appear before the Arbitrator on 16.4.2007 at 4:00 p.m.

The petition stands disposed of accordingly.

(VIJENDER JAIN)
CHIEF JUSTICE

March 01,2007.
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